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Why Proxy Access Isn't Fair

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Early this year, GE announced a new policy: It will allow groups of shareholders to nominate candidates to its Board and place those nominees in the company's proxy statement, as long as the candidates' backers have owned at least 3 percent of GE's shares for at least three years.

This policy is called proxy access, and in adopting it, GE follows in the footsteps of Verizon in 2014 and Hewlett-Packard in 2013.

Until now, GE, Verizon and Hewlett-Packard have been rare birds. In 2014, only 17 proxy access measures were voted on; just six passed, according to Institutional Shareholder Services ("ISS"), the largest U.S. proxy advisory firm.

But today, the number of proxy access proposals placed on company ballots by various pension funds is skyrocketing. According to FactSet Research Systems, there have been 86 shareholder-sponsored proxy access proposals at Russell 3000 companies so far this year

There is a defined path that shareholders can follow to run for a board seat that activist shareholders have used for a long time. Over the past three years alone, these activists have engaged in 248 campaigns for board seats and have enjoyed great success, achieving victories through votes or settlements in more than 75 percent of their engagements. Those victories were won using tools available to all shareholders: filing competing proxy materials, meeting with institutions and presenting cases to ISS. In so doing, activists invested their own time and money. And because of that investment, they have needed to make sure their efforts yield a return for all shareholders.

But proxy access is a sort of free pass to activism, and the question arises as to why various pension funds and large institutions, the only entities large enough to possibly qualify under the current proxy access proposals, need special rules designed to lower costs for themselves and no one else. Proxy access, which may seem like a step toward greater openness in corporate governance, actually privileges a special shareholder class — one that has held at least 3 percent of a company's shares for at least three years. The fact that its proponents are asking companies to bear the costs of their activism may speak to agendas that are less about maximizing shareholder value and more about advancing the special interests of the elected officials who run large public retirement funds. These proposals generate great political publicity for the pension funds, but will the proposals truly result in value for shareholders?

Part of good corporate governance is about treating all shareholders equally. But proxy access, by stipulating the need to hold 3 percent of a company for three years, creates a special class of stakeholders and then smoothes a path to the board for them. The federal court was right when it ruled against the Securities and Exchange Commission's attempt to impose proxy access on U.S. firms three years ago.

Put bluntly, true activism and good corporate governance are about treating all shareholders fairly and equally — something proxy access proposals do not promote. ■

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